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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

Supreme Court No. R-15-0018

**PETITION TO AMEND RULES
31, 34, 38, 39 and 42, ARIZONA
RULES OF SUPREME COURT**

**COMMENT OF
THE STATE BAR OF ARIZONA**

Petition R-15-0018, which proposes amending Rules 31, 34, 38, 39 and 42, Ariz. R. Sup. Ct., resulted from the Supreme Court's Committee on the Review of Supreme Court Rules Governing Professional Conduct and the Practice of Law, chaired by Justice Ann A. Scott Timmer.

The State Bar of Arizona lauds the committee ("the Timmer Committee") for completing such a huge task in a short time, and supports the proposed rule modifications with only one exception. The State Bar recommends against adopting part of the proposed new Comment [2] to ER 4.2 (Communication with Person Represented by Counsel).

Proposed new Comment [2] corresponds to Comment [5] of the American Bar Association's Model Rule 4.2 but with significant additional words.

The proposed new Comment reads:

1
2 Communications authorized by law may include communications by a
3 lawyer on behalf of a client who is exercising a constitutional or other
4 legal right to communicate with the government. Communications
5 authorized by law may also include investigative activities of lawyers
6 representing governmental entities, directly or through investigative
7 agents, prior to the commencement of criminal or civil enforcement
8 proceedings. *When communicating with the accused in a criminal
9 prosecution about a matter other than the criminal prosecution*, a
government lawyer must comply with this Rule in addition to honoring
the constitutional rights of the accused. The fact that a communication
does not violate a state or federal constitutional right is insufficient to
establish that the communication is permissible under this Rule.

10 Petition at 75 (emphasis added). The language of the corresponding Model Rule
11 Comment reads:

12 Communications authorized by law may include communications by a
13 lawyer on behalf of a client who is exercising a constitutional or other
14 legal right to communicate with the government. Communications
15 authorized by law may also include investigative activities of lawyers
16 representing governmental entities, directly or through investigative
17 agents, prior to the commencement of criminal or civil enforcement
18 proceedings. *When communicating with the accused in a criminal
19 matter*, a government lawyer must comply with this Rule in addition to
honoring the constitutional rights of the accused. The fact that a
communication does not violate a state or federal constitutional right is
insufficient to establish that the communication is permissible under
this Rule.

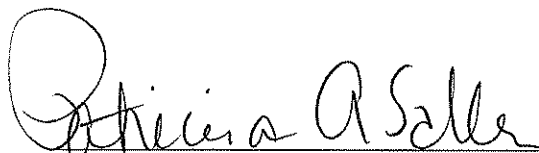
20 ABA Model Rule of Prof'l Conduct 4.2 cmt. [5] (emphasis added).

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22 The language of the proposed new Comment could be interpreted to authorize
23 communications by a government lawyer with a person the lawyer knows to be
24 represented, depending on how the government lawyer viewed the subject matter of
25 the communication. This is an expansion of what ER 4.2 allows.

1 As a result, the State Bar only endorses the first and fourth sentences of the
2 Petition's proposed new Comment [2] and opposes the inclusion of the second and
3 third sentences of the proposed new Comment [2]. Thus, the State Bar recommends
4 the following language as the new Comment [2] to ER 4.2:

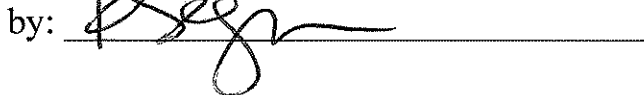
5 Communications authorized by law may include communications by a
6 lawyer on behalf of a client who is exercising a constitutional or other
7 legal right to communicate with the government. The fact that a
8 communication does not violate a state or federal constitutional right is
9 insufficient to establish that the communication is permissible under
this Rule.

10 RESPECTFULLY SUBMITTED this 18th day of May, 2015.

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13 Patricia A. Sallen
14 Deputy General Counsel
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17 Electronic copy filed with the
18 Clerk of the Arizona Supreme Court
19 this 18th day of May, 2015.

20 by: 
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